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# DELANO & DELANO

September 29, 2016

**VIA CERTIFIED MAIL**

Theodora L. Davis  
Agent for Service of Process  
IMS Recycling Services, Inc.  
2697 Main Street  
San Diego California 92113

Terry Schneider  
IMS Recycling Services  
2731 Newton Avenue  
San Diego California 92113

Deborah Odle  
IMS Recycling Services  
2731 Newton Avenue  
San Diego California 92113

Matt August  
IMS Recycling Services  
2731 Newton Avenue  
San Diego California 92113

**VIA CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

**Re: Clean Water Act Notice of Intent to Sue/60-Day Notice Letter  
IMS Recycling Services WDID 9 37I013270 Violations of General Industrial Permit**

Dear Mr. Schneider:

Please accept this letter on behalf of the San Diego Coastkeeper (Coastkeeper) regarding IMS Recycling Services, Inc.'s violations of the State Water Resources Control Board Water Quality Order No. 97-03-DWQ, Natural Pollutant Discharge Elimination System (NPDES), General Permit No. CAS000001, and Waste Discharge Requirements for Discharges of Storm Water Associated With Industrial Activities Excluding Construction Activities (General Industrial Permit).<sup>1</sup> This letter constitutes

<sup>1</sup> On April 1, 2014, the State Water Resources Control Board adopted Order No. 2014-0057-DWQ, which amends the Industrial General Permit ("New Industrial Permit"). These amendments became effective on July 1, 2015. All references to the General Industrial Permit are to the Permit as it existed at the time of the violations noted herein. The 2015 Permit superseded the 1997 Permit, except for enforcement purpose, and its terms are as stringent, or more stringent, than the terms of the 1997 Permit. See 2015 Permit, Findings, Paragraph 6. Accordingly, Facility is liable for violations of the 1997 Permit and ongoing violations of the 2015 Permit, and civil penalties and injunctive relief are available as remedies. See *Illinois v. Outboard Marine, Inc.*, 680 F.2d 473, 480-81 (7<sup>th</sup> Cir. 1982) (relief granted for violations of an expired permit); *Sierra Club v. Aluminum Co. of Am.*, 585 F. Supp. 842, 853-54 (N.D.N.Y.

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Coastkeeper's notice of intent to sue for violations of the Clean Water Act and General Industrial Permit for the IMS Recycling Products, Inc. facility located at 2731 Newton Avenue, San Diego California 92113 ("Facility", "IMS Newton Facility", or "IMS Facility"), as set forth in more detail below.

Section 505(b) of the Clean Water Act requires that sixty (60) days prior to the initiation of a citizen's civil lawsuit in Federal District Court under Section 505(a) of the Act, a citizen must give notice of the violations and the intent to sue to the violator, the Administrator of the U.S. Environmental Protection Agency, the Regional Administrator of the U.S. Environmental Protection Agency for the region in which the violations have occurred, the U.S. Attorney General, and the Chief Administrative Officer for the State in which the violations have occurred (33 U.S.C. § 1365(b)(1)(A)). This letter provides notice of IMS Recycling's Clean Water Act violations and Coastkeeper's intent to sue.

## **I. Background**

### **A. Coastkeeper**

Coastkeeper is a nonprofit organization committed to protecting and restoring the San Diego region's water quality and supply. A member of the international Waterkeeper Alliance, Coastkeeper's main purpose is to preserve, enhance, and protect San Diego's waterways, marine sanctuaries, coastal estuaries, wetlands, and bays from illegal dumping, hazardous spills, toxic discharges, and habitat degradation. Coastkeeper implements this mission through outreach, education, activism, participation in governmental hearings, and prosecuting litigation to ensure that San Diego's beaches, bays, coastal waters and tributary streams and rivers meet all substantive water quality standards guaranteed by Federal, State, and local statutes and regulations. Coastkeeper's office is located at 2825 Dewey Road, Suite 200 in San Diego, California 92106.

Members of Coastkeeper use and enjoy the waters into which pollutants from IMS Recycling's ongoing illegal activities are discharged, namely San Diego Bay and eventually the Pacific Ocean (Receiving Waters). The public and members of Coastkeeper use these Receiving Waters to fish, boat, kayak, surf, swim, scuba dive, birdwatch, view wildlife, and to engage in scientific studies. The discharge of pollutants by IMS Newton Facility affects and impairs each of these uses. Further, these violations are ongoing and continuous. Thus, the interests of Coastkeeper's members have been, are being, and will continue to be adversely affected by IMS Newton Facility Owners and/or Operators' failure to comply with the Clean Water Act and the General Industrial Permit.

### **B. The Owner and/or Operator of the IMS Recycling Facility**

Information available to Coastkeeper indicates that IMS Recycling Services, Inc. is an owner and/or operator of the IMS Recycling Facility. IMS Recycling Services, Inc. is an active corporation registered in California. Information available to Coastkeeper indicates the registered agent for IMS Recycling Services, Inc. is Theodora L. Davis, located at 2697 Main Street, San Diego California 92113.

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1984) (holding that the Clean Water Act's legislative intent and public policy favor allowing penalties for violations of an expired permit); Pub. Interest Group of N.J. v. Carter-Wallace, Inc., 684 F. Supp. 115, 121-22 (D.N.J. 1988) ("Limitations of an expired permit, when those limitations have been transferred unchanged to the newly issues permit, may be viewed as currently in effect.").

The June 17, 2016 Notice of Intent for the IMS Recycling Facility lists Deborah Odle as Operator. The SMARTS database lists Deborah Odle as Owner/Operator and Terry Schneider as Legally Responsible Person (LRP). The 2015 SWPPP lists Matt August as LRP. The 2015 SWPPP lists "IMA Group" as the property owner. Coastkeeper refers to IMS Recycling Services, Inc., Deborah Odle, Terry Schneider, Matt August, and the IMS Group collectively as the IMS Facility "Owner and/or Operator."

The IMS Newton Facility Owner and/or Operator has violated and continues to violate the procedural and substantive terms of the Storm Water Permit including, but not limited to, by illegally discharging pollutants from the IMS Newton Facility into local surface waters. As explained herein, the IMS Newton Facility Owner and/or Operator is liable for violations of the Stormwater Permit and the Clean Water Act.

## **II. Storm Water Pollution and the General Industrial Permit**

### **A. Duty to Comply**

Under the Clean Water Act, the discharge of any pollutant to a water of the United States is unlawful except in compliance with certain provisions of the Clean Water Act. (See 33 U.S.C. § 1311 (a)). In California, any person who discharges storm water associated with industrial activity must comply with the terms of the General Industrial Permit in order to lawfully discharge.

Information available to Coastkeeper indicates the IMS Newton Facility Owners and/or Operators conduct industrial support services for recycling activities at the Newton Facility location. Activities include the repair of equipment used in recycling activities such as material storage bins, trucks, loaders, forklifts, and other recycling equipment. The Facility SIC Code is 5093, Scrap and Waste Materials.

Information available to Coastkeeper indicates IMS Recycling enrolled as a discharger subject to the General Industrial Permit on July 11, 1997 for its facility located at 2731 Newton Ave, San Diego California 92113. IMS Recycling enrolled under the New Industrial Permit on April 20, 2015, WDID Number 9 37I013268. IMS Recycling again filed NOIs on May 4, 2016 and June 17, 2016 under the same WDID Number.

Information available to Coastkeeper indicates the IMS Newton Facility's operations consist of all activities required to repair recycling equipment including storage bins, trucks, loaders, forklifts, and other equipment. Equipment requiring repair is stored on the ground. Stormwater contact with stored materials potentially can result in the suspension of sediment or metal paint particles in stormwater discharges. Additionally, metal pieces used in repairs may come into contact with stormwater, which can result in the suspension of metal particles in stormwater discharges. Equipment repair activities require the removal of lubricating and other fluids from machinery. These activities also can dislodge dirt and other potential contaminants from the equipment. During this process, these materials and fluids could fall onto paved services where stormwater discharges carry materials and fluids offsite. Activities such as torching, cutting, welding, and other repair work generates metal particulates, including iron and steel, which can come into contact with stormwater and be discharged. Further, the loading and unloading of



metal bins and containers can result in metal and other particulates coming into contact with stormwater and discharging from the site.

Storm water discharges from Scrap and Waste Recycling facilities, like the IMS Newton Facility, contain pollutants such as total suspended solids, oil and grease, chemical oxygen demand, and toxic heavy metals (such as copper, lead, and zinc). Some of these pollutants are on the list of chemicals published by the State of California as known to cause cancer, birth defects, and/or developmental or reproductive harm. San Diego Bay shoreline is on the 303(d) list as impaired for copper, zinc, and sediment toxicity, among other parameters. San Diego Bay is on the 303(d) list as impaired for copper and PCBs. Polluted discharges from industrial sites such as the IMS Newton Facility contribute to the degradation of these already impaired surface waters and of the ecosystems and wildlife that depend on them.

Pursuant to Section C(1) of the General Industrial Permit, a facility operator must comply with all conditions of the General Industrial Permit. (See New Industrial Permit, §I.A.8. [dischargers must “comply with all requirements, provisions, limitations, and prohibitions in this General Permit.”]). Failure to comply with the General Industrial Permit is a Clean Water Act violation. (General Industrial Permit, § C.1). Any non-compliance further exposes an owner/operator to an (a) enforcement action; (b) General Industrial Permit termination, revocation and re-issuance, or modification; or (c) denial of a General Industrial Permit renewal application. As an enrollee, IMS Newton Facility has a duty to comply with the General Industrial Permit and New Industrial Permit and is subject to all of the provisions therein.

#### **B. Failure to Monitor and Report**

Facility operators must collect samples of stormwater discharges from all locations where stormwater may be discharged from the facility. 1997 Permit Sections B(5), B(7); 2015 Permit, Section XI(B)(4)-(5). Through the 2014-2015 reporting period, facility operators were required to analyze stormwater samples for pH, total suspended solids, total organic carbon (or oil and grease as a substitute), specific conductance, toxic chemicals, and other pollutants which are likely to be present in significant quantities in stormwater discharging from the facility. 1997 Permit, Section B(5). Dischargers must revise the SWPPP in response to these observations to ensure that BMPs are effectively reducing and/or eliminating pollutants at the facility. 1997 Permit Sections B(3)-(4); 2015 Permit Section XI.A.4.

The IMS Facility Owner and/or Operator failed to collect and analyze storm water samples as required by the Industrial General Permit. Through the 2014-2015 reporting period the Permit required permittees to collect storm water samples during the first hour of discharge from (1) the first storm event of the wet season, and (2) at least one other storm event in the wet seasons. 1997 Permit, Section B(5)(a). The IMS Newton Facility Owner and/or Operator consistently failed to collect the required storm water samples in violation of the Permit's MRP requirements. For example, the IMS Facility Owner and/or Operator collected only one (1) sample during only the 2010-2011, 2011-2012, 2012-2013, and 2014-2015 reporting year, and no storm samples were collected during the 2013-2014 reporting year.

The IMS Newton Facility Owner and/or Operator also failed to collect, analyze, and report storm water samples as required by the New Permit. The New Permit requires facility owners and/or operators

to collect and analyze storm water samples from two (2) qualifying storm events (QSE)<sup>1</sup> within the first half of each reporting year (July 1 to December 31) and two (2) QSE within the second half of the reporting year (January 1 to June 30). Section XI.B.2. Pursuant to the monitoring and reporting requirements of the Industrial Stormwater Permit, facility operators must conduct visual observations and collect samples of storm water from all locations where storm water is discharged. 1997 Permit Sections B(5) and B(7); 2015 Permit Section XI.A.2., XI.B. All sampling and analytical results for all samples must be submitted via SMARTS within 30 days of obtaining all results, and self-reporting must be done in electronic format. Section XI.B.11.; Finding I.J.56; Fact Sheet Section I.D.3. The 2015 Permit allows for the reduction of sampling occurrences only in limited circumstances, such as when a facility owner and/or operator is a Compliance Group Participant. Section XI.B.3. The IMS Newton Facility Owner and/or Operator failed to collect and report the required storm water samples in violation of the 2015 Permit's MRP requirements. For example, the IMS Newton Facility Owner and/or Operator failed to sample and report via SMARTS within 30 days two (2) QSEs during the first half of the reporting year despite qualifying rain events, and failed to sample and report two (2) QSEs via SMARTS any rain events during QSEs during the second half of the reporting year. As such, the Facility Owner and/or Operator have failed to collect and analyze storm water samples are required by the Industrial General Permit.

The IMS Facility Owner and/or Operator has failed and continues to fail to submit Annual Reports that comply with the Storm Water Permit reporting requirements. For example, in each Annual Report since the filing of the 2011-2012 Annual Report, the IMS Facility Owner and/or Operator certified that: (1) a complete Annual Comprehensive Site Compliance Evaluation was done pursuant to Section A.9 of the Storm Water Permit; (2) the SWPPP's BMPs address existing potential pollutant sources; and (3) the SWPPP complies with the Storm Water Permit, or will otherwise be revised to achieve compliance. However, information available to Coastkeeper indicates that these certifications are erroneous. For example, although storm water samples collected from the Facility have consistently contained elevated concentrations of pollutants, demonstrating that BMPs must be revised, the Annual Report fails to address this, as required by the Storm Water Permit. Moreover, the IMS Newton Facility Owner and/or Operator has never conducted the Annual Comprehensive Site Compliance Evaluation Report (ACSCER), as demonstrated by the failure to document this assessment in the Annual Report. See Annual Reports, Form 5: Annual Comprehensive Site Compliance Evaluation Potential Pollutant Source/Industrial Activity BMP Status.

The IMS Newton Facility Owners and/or Operators had numerous opportunities to sample and report but failed to do so. They are thus subject to penalties in accordance with the General Industrial Permit – punishable by a minimum of \$37,500 per day of violation. (33 U.S.C. §1319(d); 40 CFR 19.4).

**C. The IMS Recycling Facility Discharges Contaminated Storm Water in Violation of the General Industrial Permit**

**i. Discharges of Polluted Storm Water from the IMS Facility in Violation of Discharge Prohibitions and Effluent Limitations of the Storm Water Permit**

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<sup>1</sup> A QSE is defined as "a precipitation event that: a. produces a discharges for at least one drainage area; and, b. is preceded by 48 hours with no discharge from any drainage area. 2015 Permit, Section XI.B.1.



The IMS Newton Facility Owners and/or Operators' monitoring reports indicate consistent exceedances and violations of the General Industrial Permit. Discharge Prohibition A(2) of the General Industrial Permit and New Industrial Permit Sections III.C-D prohibit storm water discharges and authorized non-storm water discharges which cause or threaten to cause pollution, contamination, or nuisance.

Effluent Limitations of the Industrial Storm Water Permit require dischargers to reduce or prevent pollutants in their storm water discharges through implementation of best management practices ("BMPs") that achieve best available technology economically achievable ("BAT") for toxic pollutants<sup>2</sup> and best conventional pollutant control technology ("BCT") for conventional pollutants.<sup>3</sup> Effluent Limitations are found in Section B(3) of the General Industrial Permit and Section V.A. of the New Permit. EPA Benchmark Levels are relevant and objective guidelines to evaluate whether a permittee's BMPs achieve compliance with BAT/BCT standards as required by Effluent Limitations of the Stormwater Permit.<sup>4</sup>

Storm water sampling at the IMS Newton Facility demonstrates that the Facility's storm water discharges contain concentrations of pollutants above the Benchmark Levels. *See table below* (listing the Facility's storm water samples exceeding Benchmark Level(s), as reported to the Regional Board by the IMS Facility Owner and/or Operator). For example, the saltwater EPA Benchmark for copper is 0.0048 mg/L. A storm water sample collected from the Facility in January 2013 exceeded the saltwater EPA Benchmark for copper by over fifty (50) times and a more recent sample from September 2015 exceeded the benchmark by over seventy-six (76) times. Another sample collected in December 2014 exceeded the copper benchmark by nearly twelve (12) times. Finally, a sample collected in January 2013 exceeded the EPA saltwater benchmark for zinc (0.09) by over six (6) times and a sample from September 2015 exceeded that benchmark for zinc by over ten (10) times. There are significant and ongoing benchmark exceedances every year with every single storm event reported for the past five years. *See Table below.*

The New Permit establishes numeric action levels ("NALs") which are pollutant levels in discharges that, if exceeded, indicate that a facility's BMPs are inadequately developed or implemented, or both, and must be improved. 2015 Permit, Fact Sheet at 55-60. The sampling from discharges from the IMS Facility exceed the NALs for copper, zinc, iron, aluminum, and COD. These exceedances are further evidence demonstrating that Facility has and continues to fail to develop, implement, and/or maintain BMPs to reduce pollutant levels in storm water discharges as required by the Storm Water Permit, and that Facility has not developed or implemented, or revised, a SWPPP as required by the Storm Water Permit.

Coastkeeper puts IMS Recycling's Owner and/or Operator on notice that the Effluent Limitations are violated each time storm water discharges from the Facility. These discharge violations are ongoing and will continue every time the Facility discharges polluted storm water without developing and/or implementing BMPs that achieve compliance with the BAT/BCT standards. Each time IMS Recycling

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<sup>2</sup> BAT is defined at 40 CFR § 442.23. Toxic pollutants are listed at 40 C.F.R. § 401.15 and include copper, lead, and zinc, among others.

<sup>3</sup> BCT is defined at 40 C.F.R. § 442.22. Conventional pollutants are listed at 40 C.F.R. § 401.16 and include biological oxygen demand, total suspended solids, oil and grease, pH, and fecal coliform.

<sup>4</sup> *See* EPA Multi-Sector General Permit (2015), Fact Sheet, p. 52; *see also*, EPA Proposed Multi-Sector General Permit (2013), Fact Sheet, p. 50; EPA Multi-Sector General Permit (2008), Fact Sheet, p. 106; EPA Multi-Sector General Permit, 65 Federal Register 64839 (2000).

discharges polluted storm water in violation of Effluent Limitations B(3) of the Permit and V.A. of the New permit is a separate and distinct violation of the Permit and Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). IMS is subject to civil penalties for all violations of the Clean Water Act occurring since September 29, 2011.

Coastkeeper puts IMS Facility Owner and/or Operator on notice that the 2015 Permit Effluent Limitation V.A. is a separate, independent requirement with which Facility must comply, and that carrying out the iterative process triggered by exceedances of the NALs listed in Table 2 of the 2015 Permit does not amount to compliance with the Permit's Effluent Limitations. While exceedances of the NALs demonstrate that a facility is among the worst performing facilities in the State, the NALs do not represent technology based criteria relevant to determining whether an industrial facility has implemented BMPs that achieve BAT/BCT.<sup>5</sup> Finally, even if Facility submits an Exceedance Response Action Plan(s) pursuant to Section XII. of the 2015 Permit, the violations of Effluent Limitation V.A. described in this Notice Letter are ongoing.

Because the IMS Newton Facility's discharge violations are ongoing, post July 1, 2015, each storm water discharge from the IMS Newton Facility constitutes a violation of Effluent Limitation V.A. of the New Permit. The repeated and significant exceedances of water quality standards and Benchmark Levels demonstrate that the IMS Newton Facility Owner and/or Operator has failed and continues to fail to develop and/or implement required BMPs at the Facility that achieve compliance with the BAT/BCT standards.

**ii. Discharges of Polluted Storm Water from the IMS Facility in Violation of Receiving Water Limitations of the Storm Water Permit**

Receiving Water Limitation C(1) of the Storm Water Permit prohibits storm water discharges to surface or groundwater that adversely impact human health or the environment. Receiving Water Limitation C(2) prohibits storm water discharges and authorized non-storm water discharges which cause or contribute to an exceedance of any water quality standards or applicable Basin Plan water quality standards. (See New Industrial Permit Receiving Water Limitations VI.A-C). In addition, Receiving Water Limitation VI.C. of the New Industrial Permit prohibits discharges that contain pollutants in quantities that threaten to cause pollution or a public nuisance.

The California Toxics Rule ("CTR"), 40 C.F.R. 131.38, is an applicable water quality standard. (*Baykeeper v. Kramer Metals, Inc.* (C.D.Cal. 2009) 619 F.Supp.2d 914, 926). "In sum, the CTR is a water quality standard in the General Permit, Receiving Water Limitation C(2). A permittee violates Receiving Water Limitation C(2) when it 'causes or contributes to an exceedance of' such a standard, including the CTR." (*Id.* at 927).

If a discharger violates Water Quality Standards, the General Industrial Permit and the Clean Water Act require that the discharger implement more stringent controls necessary to meet such Water

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<sup>5</sup> "The NALs are not intended to serve as technology-based or water quality-based numeric effluent limitations. The NALs are not derived directly from either BAT/BCT requirements or receiving water objectives. NAL exceedances defined in [the 2015] Permit are not, in and of themselves, violations of [the 2015] Permit." 2015 Permit, finding 63, p. 11. Exceedances of the NALS do, however, trigger reporting requirements. See 2015 Permit, Section XII.



Quality Standards. (General Industrial Permit, Fact Sheet p. viii; 33 U.S.C. § 1311(b)(1)(C)). The IMS Newton Facility Owners and/or Operators have failed to comply with this requirement, routinely violating Water Quality Standards without implementing BMPs to achieve BAT/BCT or revising the Facility's STP pursuant to General Industrial Permit section (C)(3) and New Industrial Permit Section X.B.1.

As demonstrated by sample data submitted by IMS Recycling, from September 29, 2011 through the present, the IMS Recycling Owners and/or Operators have discharged and continue to discharge storm water containing pollutants at levels in violation of water quality prohibitions and limitations during every significant rain event. The IMS Newton Facility's sampling data reflects numerous discharge violations (see below table). IMS Newton Facility's own sampling data is not subject to impeachment. (*Baykeeper*, *supra*, 619 F.Supp. 2d at 927, citing *Sierra Club v. Union Oil Co. of Cal.*, (9th Cir. 1987) 813 F.2d 1480, 1492 ["when a permittee's reports indicate that the permittee has exceeded permit limitations, the permittee may not impeach its own reports by showing sampling error"]).

The Storm Water Permit Receiving Water Limitations are violated each time polluted storm water discharges from the Facility. These discharge violations are ongoing and will continue every time contaminated storm water is discharged in violation of the Receiving Water Limitations. Each time discharges of storm water from the Facility cause or contribute to a violation of an applicable WQS is a separate and distinct violation of Receiving Water Limitation C(2) of the Permit, Receiving Water Limitation VI.A. of the New Permit, and Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). Each time discharges from the Facility adversely impact health or the environment is a separate and distinct violation of Receiving Water Limitation C(1) of the Permit, Receiving Water Limitation of the 2015 Permit, and Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

This data further demonstrates the IMS Recycling Facility continuously discharges contaminated storm water during rain events which have not been sampled.

No.	Date	Parameter	Units	Result	Benchmark/WQO
1	9/15/2015	Copper	mg/L	0.367	0.0048
2	9/15/2015	Aluminum	mg/L	0.92	0.75
3	9/15/2015	Iron	mg/L	1.91	1
4	9/15/2015	Zinc	mg/L	0.948	0.09
5	9/15/2015	COD	mg/L	246	120
6	12/12/2014	Copper	mg/L	0.057	0.0048
7	1/25/2013	Copper	mg/L	0.246	0.0048
8	1/25/2013	Zinc	mg/L	0.588	0.09
9	1/25/2013	COD	mg/L	146	120
10	2/7/2012	Aluminum	mg/L	1.55	0.75
11	2/7/2012	Copper	mg/L	0.364	0.0048
12	2/7/2012	Iron	mg/L	2.87	1
13	2/7/2012	Zinc	mg/L	0.560	0.09
14	2/7/2012	COD	mg/L	124	120



Coastkeeper puts IMS Facility Owner and/or Operator on notice that the 2015 Permit Receiving Water Limitations are separate, independent requirements with which Facility must comply, and that carrying out the iterative process triggered by exceedances of the NALs listed in Table 2 of the 2015 Permit does not amount to compliance with the Permit's Receiving Water Limitations. While exceedances of the NALs demonstrate that a facility is among the worst performing facilities in the State, the NALs do not represent water quality based criteria relevant to determining whether an industrial facility has caused or contributed to an exceedance of a water quality standard.<sup>6</sup> Finally, even if IMS Owner and/or Operators submit an Exceedance Response Action Plan(s) pursuant to Section XII. of the 2015 Permit, the violations of the Receiving Water Limitations described in this Notice Letter are ongoing.

#### D. Inadequate Storm Water Pollution Prevention Plan

One of the main requirements for the General Industrial Permit is the Storm Water Pollution Prevention Plan (SWPPP). (General Industrial Permit §A; New Industrial Permit §X.). The primary objective of the SWPPP is to identify and evaluate sources of pollutants associated with industrial activities that may affect the quality of storm water discharges from the Facility, and to implement site-specific BMPs to reduce or prevent pollutants associated with industrial activities in storm water discharges. See Permit, Section A(2) and New Permit Section something or other. These BMPs must achieve compliance with the Storm Water Permit's Effluent Limitations and Receiving Water Limitations. IMS Recycling has not developed an adequate SWPPP as required by the General Permit or New Industrial Permit, with many of the required elements noticeably absent from the IMS Recycling Facility SWPPP. (New Industrial Permit, §X.A.1-10).

For example, the latest IMS Recycling SWPPP fails to identify any areas of the facility where the minimum BMPs described in the SWPPP or required under the Industrial General Permit Section H.1. will not adequately reduce or prevent pollutants in storm water discharges in compliance with the effluent limitations in the permit described above. Further, despite the repeated, numerous, and significant exceedances of benchmarks and C.T.R. that have occurred and continue to occur at the site with every significant rainfall, the SWPPP fails to fulfill the Assessment of Potential Pollutant Resources requirements in Section A.7. and the Storm Water Best Management Practices requirements of section A.8 of the Industrial Permit and Section G.2. of the New Permit. For example, Section X.G.2.b. of the new permit requires discharges to identify any advanced BMPs for areas where minimum BMPs are identified as inadequate to reduce or prevent pollutants in discharges in compliance with Section V.A. Instead, the 2015 SWPPP summarizes that, **"No treatment control BMP's are required in this facility"** (emphasis original). This is the case even though BMPs implemented to date have failed to achieve the discharge, effluent, and receiving water limitations of the Permit.

Sections A(3) through A(10) of the Permit set out the requirements for a SWPPP. Among other requirements, the SWPPP must include the following: a pollution prevent team; a site map with detailed demarcations of potential pollutant sources, storm water flows, and discharge/sampling points; a

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<sup>6</sup> "The NALs are not intended to serve as technology-based or water quality-based numeric effluent limitations. The NALs are not derived directly from either BAT/BCT requirements or receiving water objectives. NAL exceedances defined in [the 2015] Permit are not, in and of themselves, violations of [the 2015] Permit." 2015 Permit, finding 63, p. 11. Exceedances of the NALS do, however, trigger reporting requirements. See 2015 Permit, Section XII.

description and assessment of potential pollutant sources; and a description of BMPs, including both structural and non-structural techniques. Section X(D)-X(I) of the New Permit sets for essentially the same SWPPP requirements, except that all dischargers are now required to develop and implement a set of minimum BMPs, as well as advanced BMPs as necessary to achieve BAT/BCT. See New Permit § X(H). The 2015 Permit further requires certain SWPPP enhancements, including a more comprehensive assessment of potential pollutant sources and more specific BMP descriptions. See New Permit X(G)(2), (4), (5).

Information available to SDCK indicates Facility has not properly developed and/or implemented the necessary BMPs to address pollutant sources, pollutants, and resulting contaminated discharges.<sup>7</sup> BMPs are necessary at the Facility to prevent the exposure of pollutants to precipitation and the subsequent discharge of polluted storm water from the Facility. Due to lack of BMPs and/or the inadequacy of the BMPs that are utilized at the Facility, industrial activities and pollutants are exposed to precipitation during rain events, and this polluted storm water discharges into the storm drain system, which discharges into Receiving Waters.

The latest SWPPP also fails to account for the numerous and repeated violations identified by IMS Newton Facility's monitoring data, thereby ensuring these violations continue. The SWPPP is therefore inadequate. (See New Industrial Permit §I.E.37. ["Compliance with water quality standards may, in some cases, require Dischargers to implement controls that are more protective than controls implemented solely to comply with the technology-based requirements in this General Permit."]).

Every day the IMS Recycling Owners and/or Operators operate the Facility without an adequate SWPPP, is a separate and distinct violation of the General Industrial Permit, New Industrial Permit, and Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). The IMS Recycling Owners and/or Operators have been in daily and continuous violation of the General Industrial Permit and New Industrial Permit since at least September 29, 2011. These violations are ongoing and the IMS Recycling Owners and/or Operators will continue to be in violation every day they fail provide an adequate SWPPP for the Facility. Thus, the IMS Recycling Owners and/or Operators are liable for civil penalties of up to \$37,500 per day of violation for 1,825 violations of the General Industrial Permit and the Clean Water Act.

### **III. Remedies**

Upon expiration of the 60-day period, Coastkeeper will file a citizen suit under Section 505(a) of the Clean Water Act for the above-referenced violations. During the 60-day notice period, however, Coastkeeper are willing to discuss effective remedies for the violations noted in this letter. If you wish to pursue such discussions in the absence of litigation, it is suggested that you initiate those discussions immediately. If good faith negotiations are not being made, at the close of the 60-day notice period, Coastkeeper will move forward expeditiously with litigation.

IMS Recycling must develop and implement an updated SWPPP, install BMPs to address the numerous and ongoing water quality violations, and implement a robust monitoring and reporting plan. Should the IMS Recycling Owners and/or Operators fail to do so, Coastkeeper will file an action against IMS Recycling for its prior, current, and anticipated violations of the Clean Water Act. Coastkeeper's

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<sup>7</sup> See table in Section C.ii. above.

action will seek all remedies available under the Clean Water Act § 1365(a)(d). Coastkeeper will seek the maximum penalty available under the law which is \$37,500 per day.

Coastkeeper may further seek a court order to prevent IMS Recycling from discharging pollutants. A strong or substantial likelihood of success on the merits of Coastkeeper's claim exists, and irreparable injuries to the public, public trust resources, and the environments will result if the Facility further discharges pollutants into Receiving Waters. The cessation of the Facility's discharge will not cease substantial harm to others, and the public interest would be served in preventing discharge of pollutants into receiving waters.

Lastly, section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), permits prevailing parties to recover costs, including attorneys' and experts' fees. Coastkeeper will seek to recover all of their costs and fees pursuant to section 505(d).

#### IV. Conclusion

Coastkeeper have retained legal counsel to represent it in this matter. Please direct all communications to Coastkeeper's legal counsel:

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If you wish to pursue settlement discussions in the absence of litigation, please contact DeLano and DeLano and San Diego Coastkeeper immediately.

Sincerely,

  
Everett L. DeLano III



## SERVICE LIST

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